412 644-5754

DATE ISSUED: November 6, 1998

CASE NO.: 1998-STA-8

In the Matter of

CLARENCE SCOTT,
Complainant

v.

ROADWAY EXPRESS, INC.,
Respondent

APPEARANCES:

Philip L. Harmon, Esq.,
For the Complainant

Mr. Michael J. Moody, Esq.
Mr. Stephen E. Baskin, Esq.
Ms. Barbara J. Leukart, Esq.
For the Respondent

BEFORE: RICHARD A. MORGAN,
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. JURISDICTION

This proceeding arises under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 [hereinafter "the Act" or "STAA"], 49 U.S.C. § 31105 (formerly 49 U.S.C. app. § 2305), and the applicable regulations at 29 C.F.R. Part 1978. The Act protects employees who report violations of commercial motor vehicle safety rules or who refuse to operate vehicles in violation of those rules.

II. PROCEDURAL HISTORY[1]

Complainant, Mr. Clarence Scott (hereinafter "Scott"), filed a complaint of discrimination with the Department of Labor, under Section 405 of the Act, against Roadway Express, Inc. (hereinafter "Roadway"), alleging he was issued a written warning by Roadway for calling off sick on March 28, 1997 and that Roadway had continued to issue disciplinary letters for bogus infractions. He was subsequently discharged by respondent, Roadway. The complaint was investigated by the Department of Labor and found not to have merit. On January 30,1998, the Secretary issued her Findings dismissing the complaint. (CX 11-21). By letter dated February 27, 1998, Scott, through counsel, requested a hearing. Notices of hearing were issued on March 9, 1998, April 24, 1998 and July 16, 1998. After several short continuances, the matter was tried on August 11, 1998, in Cleveland, Ohio.[2] In their pre-hearing submissions, both the complainant and respondent joined the issue of whether Mr. Scott was discharged in violation of the STAA. A post-hearing brief was filed by Roadway on October 23, 1998.

III. STIPULATIONS AND THE PARTIES' CONTENTIONS

A. Stipulations

The parties agreed to, and I accepted, the following stipulations of fact (TR 39-41):

1. The respondent is a motor carrier engaged in Commercial motor vehicle operations which maintains a place of business in Akron, Ohio.
2. The respondent's employees operate commercial motor vehicles, in the regular course of business, over interstate highways and connecting routes, principally to transport cargo.
3. The respondent is and was a "person," as defined in the STAA, 49 U.S.C. § 31101(3).
4. The complainant was hired as an employee of the respondent, on or about October 29, 1992 and that he was discharged.
5. The complainant worked as a driver of a commercial motor vehicle with a gross weight in excess of 10,000 pounds used on the highways to transport cargo.
6. On or about April 1, 1997 and on or about October 10, 1997, the respondent issued the complainant letters of warning for being unavailable for work.
7. The respondent sent the complainant a letter on or about October 29, 1997.
8. On or about January 30, 1998, the Area Director of the Occupational Safety

[1] References in the text are as follows: "ALJX ___" refers to the administrative law judge or procedural exhibits received after referral of the case to the Office of Administrative Law Judges; "CX __" refers to complainant's exhibits; "RX __" to respondent's exhibits; and "TR __" to the transcript of proceedings page and testifying witness' name . The parties' exhibits have two numbers: the first signifies the order in which it was presented and the second, the tab in the binders at which it is found, e.g., RX 2-15, is the respondent's second exhibit found at tab 15, in its evidence binder.

[2] As the record reflects, Mr. Scott voluntarily chose to "waive" his attendance at portions of the hearing. (TR 6-8, 35-36, 42-53, 156-159, 161, 519-524).

and Health Administration (OSHA) issued "Secretary's Findings" dismissing Mr. Scott's complaint.

9. The Office of Administrative Law Judges, U.S. Department of Labor properly exercises in personam and subject matter jurisdiction to hear this matter.

B. The Parties' Contentions:

1. *Complainant*:

The complainant argues that the four notices he provided Roadway, on April 18, 1997 (CX 2-5E), September 29, 1997 (CX 9-11), October 6, 1997 (CX 19-10B), and October 19, 1997 (CX 7-12E), constituted protected activity covered by the STAA. As a result of his protected activities and of giving notices Roadway gave him letters of warning on April 1, 1997 and October 10, 1997. (CX 2-5A and CX 7-12A). Eight days after Scott's final letter to Roadway he was fired. Other than Scott's eight letters of warning, he argues his past history is irrelevant.

Scott contends that a driver engages in protected activity under the STAA when he refuses to drive a commercial vehicle when he takes sick leave because he is too sick to do so safely. This is because the motor carrier regulations provide in pertinent part:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the motor vehicle.

49 C.F.R. § 392.3 (1997)(Emphasis added). Scott adds that Roadway's disciplinary policy, i.e., issuing letters of warning for taking "extra" sick days, is not an attendance policy, as argued by Roadway, but a violation of the STAA.

2. *Respondent*:

Roadway argues that the Secretary should give deference to the Ohio Joint State Committee's (OJSC) decision to uphold Scott's termination. Roadway had wanted Scott discharged at the local hearing, but the union did not. The OJSC was a neutral body at which the complainant was fully represented by a union representative. He had the opportunity to provide the OJSC with all the information. Roadway argues Scott's disciplinary record of ten letters of warning, and a 122-day suspension, in the prior nine months support his termination.

Roadway argues that Scott's supervisor, Mr. Olszewski, did not know of Scott's OSHA charge or complaint before Scott was discharged. Even though Scott had gone to OSHA in September 1997, the report was dated much later.

Roadway does not agree that the letters of warning given Scott were for taking sick call,

rather it argues, based on Mr. Olszewski's testimony, that the letters of warning were for violations of Roadway's "attendance" policy. Roadway argues that two of Scott's absences for sickness were not medically justified, but presented no independent evidence to support its claim. Further, Roadway contends that issuance of "letters of warning" for drivers taking time off for illness, such as in this case, when drivers have no sick leave, annual leave, or other unused personal time off available is simply a personnel management matter or an absence policy which does not run afoul of the STAA. It argues that it disciplined and or discharged Scott for legitimate, non-discriminatory reasons, namely, violations of its absenteeism policy and his overall abysmal work record.

IV. ISSUES

A. Whether, under 49 U.S.C. § 31105(a)(1)(a), the respondent discharged, disciplined or discriminated against an employee, to wit the complainant, regarding pay, terms or privileges of employment, because,

> He had filed a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order, or

B. Whether, under 49 U.S.C. § 31105(a)(1)(b)(i), the respondent discharged, disciplined or discriminated against an employee, to wit the complainant, regarding pay, terms or privileges of employment, because,

> He refused to operate a vehicle because its operation violated a regulation, standard, or order of the United States related to commercial motor vehicle safety or health, specifically 49 C.F.R. § 392.3 regarding "ill or fatigued operators."[3]

C. Whether the Secretary, under 29 C.F.R. § 1978.112(c), should defer to the outcome of action under a collective bargaining agreement (CBA), i.e., the Ohio Joint State Committee (OJSC) decision here, which upheld the complainant's discharge?

> Is it clear those proceedings dealt adequately with all factual issues, that the proceedings were fair, regular and free of procedural infirmities and that the outcome of those proceedings were not repugnant to the purposes and policy of the STAA?

D. If the respondent so violated 49 U.S.C. § 31105:

> 1. What action, if any, should be taken to abate the violation?
> 2. If and when the complainant is reinstated what will be the pay, terms and privileges of his employment?
> 3. What compensatory damages, including back pay, the

[3] Under 29 C.F.R. § 18.5(e), I find allegations of wrongful discipline or discharge are reasonably within the scope of the original complaint.

complainant may be entitled to? and,
4. What reasonable costs and expenses is the complainant entitled to in bringing and litigating the case, including attorney's fees?

V. PRELIMINARY FACTS

The complainant was hired as an employee of the respondent commercial motor carrier, on or about October 29, 1992, worked as a driver of a commercial motor vehicle, for Roadway approximately five and one half years and was discharged on or about January 14, 1998. (TR 393, 611). Mr. Scott worked at Roadway's Akron Ohio facility as an "extra-board" driver.[4] (TR 309). The Akron facility is a "break-bulk" facility which consolidates and distributes freight for the area it serves including ten satellite facilities which deal directly with customers. (TR 270-1). Scott had a lengthy list of disciplinary actions taken against him by Roadway, beginning with counseling in November 1992 and including investigations of what Roadway called six "preventable" accidents, prior to his eventual and final discharge. (TR 611- 621; RX 5-168). He was notified of his discharge from Roadway on October 29, 1997. The discharge was effective on January 14, 1998. He found new, seasonal, truck driving employment with Kenmore Construction or Highway Asphalt in April 1998. (RX 4-171 page 45).

Mr. Scott is a fifty-three year old high school graduate just thirteen hours short of obtaining a college associate's degree. (TR 605; RX 4-171 page 26). I found him to be articulate and intelligent, but frequently conveniently forgetful and somewhat less than completely forthcoming or candid in his testimony before me and at his deposition.

There being adequate support in the record for the parties stipulations in Paragraph IIIA herein, those stipulations are hereby incorporated by reference into Paragraph VI as Findings of Fact and Conclusions of Law, as if fully set forth.

VI. DISCUSSION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. STAA violations -- Overview

A complainant may recover under the Act under three circumstances:

First, by demonstrating that he was subject to an adverse employment action because he has filed a complaint alleging violations of safety regulations. 49 U.S.C. § 31105 (a)(1)(A). This provision of the Act provides specifically and in pertinent part:

> (a) Prohibitions. -- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because --

[4] Extra-board drivers lack seniority to bid on regular fixed routes and will be sent wherever the company needs them to go, along with 188 other Akron drivers, according to Mr. Olszewski. (TR 309-311).

> (A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, . . .

The U.S. Department of Labor (DOL) interprets this provision to include internal complaints from an employee to an employer. DOL's interpretation that the statute includes internal complaints has been found "eminently reasonable." *Clean Harbors Environmental Services, Inc. v. Herman,* ___ F.3d___, No. 97-2083, 1998 WL 293060 (1st Cir. June 10, 1998)(case below 95-STA-34). The Circuit Court of Appeals has stated internal communications, particularly if oral, must be sufficient to give notice that a complaint is being filed and thus that the activity is protected. There is a point at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with an employer within the meaning of the STAA. *Id*.

Second, by demonstrating that he was subject to an adverse employment action for refusing to operate a vehicle "because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." 49 U.S.C. § 31105(a)(1)(B)(i).

In such a case, the complainant must prove that an actual violation of a regulation, standard, or order would have occurred if he or she actually operated the vehicle. *Brunner v. Dunn's Tree Service*, 94 STA 55 (Sec'y Aug. 4, 1995). However, protection is not dependent upon actually proving a violation. *Yellow Freight System, Inc., v. Martin*, 954 F.2d 353, 356-357 (6th Cir. 1992).

Third, by showing that he was subject to an adverse employment action for refusing to operate a motor vehicle "because [he] has a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition." 49 U.S.C.§ 31105(a)(1)(B)(ii). To qualify for protection under this provision, a complainant must also "have sought from the employer, and been unable to obtain, correction of the unsafe condition." 49 U.S.C § 31105(a)(2).[5] This provision is not applicable to the case *sub judice*.

The burdens of proof under the Act have been adopted from the model articulated by the Supreme Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993). *See Anderson v. Jonick & Co., Inc.*, 93-STA-6 (Sec'y, September 29, 1993).

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[5] Under 49 U.S.C.A. § 31105(a)(1)(B)(ii) a complainant must prove by a preponderance of the evidence that his or her alleged reasonable apprehension of serious injury due to the vehicle's unsafe condition, was objectively reasonable. *Brame v. Consolidated Freightways*, Case No. 90-STA-20 (Sec'y Dec., June 17, 1992) slip op. at 3 and *Brunner v. Dunn's Tree Service*, 94 STA 55 (Sec'y, Aug. 4, 1995).

In *Byrd v. Consolidated Motor Freight*, 97-STA-9 at 4-5 (ARB May 5, 1998), the Administrative Review Board (ARB), summarized the burdens of proof and production in STAA whistleblower cases:

> A complainant initially may show that a protected activity likely motivated the adverse action. *Shannon v. Consolidated Freightways*, Case No. 96-STA-15, Final Dec. and Ord., Apr. 15, 1998, slip op. at 5-6. A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Shannon*, slip op. at 6; *Kahn v. United States Sec'y of Labor*, 64 F.3d 261, 277 (7th Cir. 1995).[6] A respondent may rebut this prima facie showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

In a footnote to the above paragraph, the ARB provided further explanation on this last phase of the adjudication process:

> Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant, throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by the prima facie case, the inference "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question." *St. Mary's Honor Center*, [509 U.S. at 510-511.] *See Carroll v. United States Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996) (whether the complainant previously established a prima facie case becomes irrelevant once the respondent has produced evidence of a legitimate nondiscriminatory reason for the adverse action).

Once the complainant satisfies these four elements, a rebuttable presumption of discrimination arises, and the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action. The burden shifting to the employer at that point is only to articulate a legitimate, nondiscriminatory, reason for the adverse action. The employer's burden at this point is one of production, not of proof.

> With only one exception, the burden always remains with the claimant to establish the elements of his case: (1) protected activity; (2) a causal nexus between the protected activity and the adverse action; and (3) in response to employer's evidence of an

[6] As Roadway points out, if other factors are present supporting discipline, then timing alone may not be sufficient to establish the necessary causal link. *Moon*, 836 F.2d. at 229-230.

allegedly legitimate reason for its action, evidence of pretext.[7]

The one exception to the claimant's burden of proof arises under the "dual motive" analysis: once the evidence shows that the proffered reason is not legitimate, and that the discharge was motivated at least in part by retaliation for protected activity, then the employer must establish by a preponderance of the evidence that it would have discharged the complainant independently of his protected activity. *Faust v. Chemical Leaman Tank Lines, Inc*., 93-STA-15 (Sec'y, April 2, 1996); *Moravec v. HC & M Transportation*, 90-STA-44 (Sec'y, January 6, 1992), slip op. at 12, n. 7.

Scott alleged violations of both the complaint provision at 49 U.S.C. § 31105(a)(1)(A), and the refusal to drive provisions at § 31105(a)(1)(B). I will examine the complaint provision first.

B. The Complaint Provisions

Scott complained, either in writing or verbally, to company superiors, his union, and to a government agency that Roadway's "absence" policy violated federal trucking regulations. See CX 2-5E, CX 9-11, CX 19-10B, and CX 7-12E. From the evidence admitted, it appears Mr. Scott's earliest complaint concerning Roadway's alleged violations of DOT Reg. 392.3 was on April 10, 1997. (RX 1-169-22; TR 663). He complained about the sick leave policy a total of five times between April 10, 1997 and January 21, 1998.

The following is a listing of Mr. Scott's grievances, rebuttals to letters of warning, protests and complaints to Roadway and his one complaint to OSHA:

Topic	Date	Exh #
1. General denial of 3/24/97 failure to complete shift (LW+ 3/24/97).*	3/24/97	CX 14-4D
2. Non-specific rebuttal to LW 3/24/97.*	4/4/97	RX 1-169-12
3. Reported within 1.55 hours. Not late. (4/7/97 LW).*	4/12/97	RX 1-169-27
4. Alleged violation of 49 C.F.R § 392.3.* (LW 4/1/97 unavailable for work 3/28-3/31/97 sick call). [Attached illness verification]	4/10/97	CX 2-5C RX 1-169-22

[7] In *Moon v. Transport Drivers, Inc*., 836 F.2d 226 (6th Cir. 1987), the court noted the addition of a fourth factor, i.e., that the employer knew of the plaintiff's protected activity. *Id.* at 229 n. 1.

	(TR 88)		
5.	Alleged violation of 49 C.F.R § 392.3.*	**4/18/97**	**CX 2-5E**
	(Illness Verification, 3/29/97, attached.	(4/1/97)*	CX 2-5D
	CX 1-23A, 2-5F & G). See CX 1-23B.		RX 1-169-20
	(TR 282).		
	HMO Progress Notes of 3/29/97. (TR 116)		RX 1-169-21
6.	Reasons for not making running time,	5/4/97	RX 1-169-21
	including GI problem. (4/21/97 LW).*[8]		CX 16-7E
7.	Challenges late to work LW of 8/13/97.*	8/22/97[9]	RX 1-169-35
8.	Challenges late to work LW of 8/13/97.*	8/23/97	CX 17-8D
			RX 1-169-34
9.	Argues 9/5/97 LW (48-hour rule) is	9/10/97	RX 1-169-38
	inaccurate.* (Court appearance 8/26/97).*		RX 1-169-41
10.	Challenge 9/5/97 LW (48-hour rule).*	9/10/97	CX 18-9E
	(With Bid Work Rules: All Drivers, Akron Domiciled Road Drivers)[10]		RX 1-169-47 CX 18-9F
11.	Disputes accuracy of 9/25/97 LW.*	9/28/97	RX 1-169-55
12.	Scott's statement to OSHA.[11]	**9/29/97**	**CX 9-11**
	(Signed **1/21/98**). (TR 122)		
	(RX 4-171, pp. 359-362).		
13.	Challenges 9/25/97 LW alleging	10/6/97	RX 1-169-52
	hazardous conditions.*		
14.	Citing safe driving for hazardous	**10/6/97**	**CX 19-10B**
	conditions, challenges LW		
	of 9/17/97.*		
15.	Challenges 10/10/97 LW as viol-	**10/19/97**	**CX 7-12E**
	ating section 392.3.* See Dr. Bouchard's		RX 1-169-72
	10/8/97 illness verification &		CX 3-24A

[8] Running times are agreed to in contract negotiations. Times are listed in RX 1-169-31.

[9] The work rules describing the two-hour report to work rule and consequences of violations. RX 1-169-36.

[10] Paragraph 11 of the Bid Work Rules explains the 48-hour off rule. (CX 18-9F). Mr. Olszewski also explained that drivers are entitled, under locally-negotiated rules, to 48 hours off upon completion of six uninterrupted tours of duty, or work days. (TR 308, 312).

[11] Typed by OSHA investigator Russell based on a September 29, 1997 meeting with Scott. (TR 122-4).

	10/6 & 10/8/97 Progress Notes.		CX 3-24B-D
16.	Challenges 10/10/97 LW saying he was off due to illness.*	10/18/97	RX 1-169-73
17.	OSHA letter to Roadway regarding Scott's alleged violations of § 392.3 and the STAA for the 3/28/97 LW & other "bogus" infractions. (TR 133-4, 339)	**10/28/97**	CX 10-16
18.	Challenges 10/27/97 discharge as unwarranted & unjustified.* (TR 88)	10/31/97	CX 6-18
19.	Challenges 10/23/97 LW for failure to follow instructions as false and based on management error.*	11/6/97 11/9/97	RX 1-169-80 RX 1-169-82
20.	Protest saying 12/3/97 warning letter for sick call violation violates DOT Reg. 392.3 and the MFA, Art. 16, § 2.*	12/11/97	RX 4-171 exh. 36

* denotes fact this was a protest in response to a Letter of Warning or discharge notice. [+]"LW" means "letter of warning." The matters denoted in bold font pertain to Scott's complaints about Roadway's sick leave policy.

Other than Scott's OSHA letter, there was no dispute that Roadway received Scott's various letters and doctors' excuses. (TR 283, 285, 341). Although OSHA's letter to Roadway is dated 10/28/97, Mr. Olszewski was not aware of it until sometime in 1998. (TR 339). OSHA investigator, Dennis Russell, had interviewed Scott at his home then subsequently typed the statement for Scott's signature. (RX 4-171, pp. 359-362).

The STAA covers, among other things, complainants who allege violations of the "illness rule" of the federal motor carrier regulations:

> No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle.

49 C.F.R. § 392.3 (1996)(emphasis added). *See, e.g., Self v. Carolina Freight Carriers Corp.*, Case No. 89-STA-9, Sec. Final Dec. and Ord., Jan. 12, 1990. Protection is not dependant on actually proving a violation of a regulation; the complaint need only relate to such a violation. *Nix*

v. Nehi-R.C. Bottling Co., Case No. 84-STA-1, Sec. Dec. and Ord., July 13, 1984, slip op. at 8-9.

Scott's complaints related to the sick call policy to Roadway and to OSHA constituted protected activity under the STAA. *See Dutkiewicz v. Clean Harbors Environmental Services, Inc.*, Case No. 95-STA-34, Final Dec. and Ord., Aug. 8, 1997, slip op. at 3-4 (internal complaint to superiors is a protected activity under the STAA); *accord, Stiles v. J.B. Hunt Transportation, Inc.*, No. 92-STA-34, Sec. Dec. and Ord., Sept. 24, 1993, slip op. at 3-4, and cases there cited; *Pillow v. Bechtel Construction, Inc.*, Case No. 87-ERA-35, Sec. Dec. and Ord. of Rem., July 19 1993, slip op. at 11 (under analogous employee protection provision of the Energy Reorganization Act, contacting a union representative about a safety violation is protected), *aff'd sub nom. Bechtel Construction Co. v. Secretary of Labor*, 98 F.3d 1351 (11th Cir. 1996); and *Ake v. Ulrich Chemical, Inc.*, Case No. 93-STA-41, Sec. Final Dec. and Ord., Mar. 21, 1994, slip op. at 5 (safety complaint to government agency is protected).[12]

Viewing the evidence in a light most favorable to the complainant and drawing all reasonable factual inferences in the complainant's favor, I granted Roadway's motion for a "directed verdict" on the § 405A "complaint" issue upon completion of the complainant's case.[13] (TR 573-599). Scott had proven that he had filed "complaints," i.e., CX 2-5E, CX 9-11, CX 19-10B, and CX 7-12E, that they concerned "protected" activities, that Roadway was aware of much of his protected activity and that he suffered adverse employment action, i.e. letters of warning and discharge, but he had not established a causal connection to either his discipline or discharge.[14] However, as noted below, I denied the remainder of the employer's motion.

Even had I not granted the directed verdict, I now find that Scott did not establish the requisite "causal nexus" and find that Roadway neither disciplined or discharged Scott because of any complaints he had made concerning protected activities.

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[12] Under the STAA a safety related complaint to any supervisor, no matter where that supervisor falls in the chain of command, can be protected activity. *See, e.g., Hufstetler v. Roadway Express, Inc.*, Case No. 85-STA-8, Sec. Final Dec. and Ord., Aug. 21, 1986, slip op. at 12, *aff'd, Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987).

[13] The earlier version of Federal Rule of Civil Procedure (FRCP) 50 provided for motions for "directed verdicts." It was used to save time and trouble litigating cases before juries when a party had no pretense of having established a *prima facie* case or where there are no controverted issues of fact upon which reasonable men could differ. Moore and Lucas, MOORE'S FEDERAL PRACTICE, Section 50.02[1], (2d Ed. 1989). FRCP 50 , revised in 1991, now provides for "Judgment as a Matter of Law" however, the change was not intended to change the existing standards under which "directed verdicts" could be granted. West Group, FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, page 209 (1998 Ed.). The new rule embodies the case law standards for directed verdicts. Id. at page 208. The use of "directed verdicts" in STAA cases appears to have the imprimatur of the Sixth Circuit Court of Appeals. *See, Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987).

[14] Nor did Scott establish that Roadway took any adverse action following his complaints as to justify any inference of retaliatory motive. In fact, the warning letters he received immediately subsequent to his complaints, grievances and notices did not concern the sick leave policy.

C. Refusal to Drive[15]

A refusal to drive is protected under two STAA provisions. The first provision, 49 U.S.C.A. § 31105(a)(1)(B)(i), requires that a complainant "show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive -- a mere good faith belief in a violation does not suffice." *Yellow Freight Systems v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993).

The second refusal to drive provision, not applicable here, focuses on whether a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury if he drove. 49 U.S.C.A. § 31105(a)(1)(B)(ii); *Cortes*, slip op. at 4.

Roadway did not contest the fact that Scott, on the occasions when he was subsequently disciplined for violating the sick leave policy, was ill and incapable of driving for Roadway. Nevertheless, Scott introduced evidence concerning his conditions. Scott submitted HMO Health Ohio illness verification forms signed by physicians, i.e., Drs. Negi and Bouchard, reflecting he was "incapacitated due to illness or injury" from 3/28/97 - 3/31/97 and 10/5/97- 10/9/97. (CX 1-23A and B [3/29/97]; CX 3-24A [10/8/98]).

Dr. Negi's Progress Notes, March 29, 1997, show Scott had "probable gastroenteritis" with its attendant symptoms. (CX 1-23B). Scott testified he had eaten something which had made him sick and gave him stomach pains, but that his hip was not bothering him that day. (TR 56-7). Scott said he called his dispatcher informing him that he was sick. (TR 58).

Dr. Bouchard's Progress Notes for 10/6/97 and 10/8/97 reflect Scott had continuing hip pain with a limp, relatively well-controlled asthma exacerbated by exposure to fumes, with restricted leg and left hip motion, and that he was given the "two-day" off-work slip for the hip pain. (CX 3-24B-D). Scott saw Dr. Bouchard on 10/5/97 but did not obtain a signed off-work slip until 10/8/97. Scott provided the illness verification to Roadway on October 9, 1997. (TR 60). Scott had had an accident in 1993 and believed he suffered from degenerative hip joint disease. (TR 61).

On October 29, 1997, Scott applied to the Ohio Bureau of Workers' Compensation for temporary total compensation. (CX 4-26D). Dr. Bouchard informed the Ohio Industrial Commission that Mr. Scott had been temporarily disabled from 10/5/97 through 10/9/97 from joint disease and asthma and needed continuing medication and physical therapy in order to

[15] I denied Roadway's motion for a directed verdict on this matter at the close of the complainant's evidence having found that the latter had established a prima facie case, under § 405B.

improve. (CX 4-26C). He observed that exacerbation was to be expected from "over-use" and weather changes. (CX 4-26C). Scott testified he received compensation as a result of that proceeding. (TR 66, 71).

A driver's refusal to drive (a 2,000 mile trip) in part because he was in pain or was drowsy due to medication has been found to constitute protected activity, i.e., making the driving unsafe. *Palazzolo v. PST Van Lines, Inc.*, 92-STA-23 (Sec'y, Mar. 10, 1993).

I find that Mr. Scott's absences for his illnesses or afflictions of March 28 through March 31, 1997, October 5 through October 8, 1997, and November 27 through November 29, 1997 constitute "protected" activity since his operation of a commercial motor vehicle would have amounted to actual violations of 49 C.F.R. § 392.3. His ability or alertness was so likely to become impaired through illness, or any other cause, i.e., the named afflictions, as to make it unsafe for him to begin to operate the motor vehicle.

D. Disciplinary Actions[16]

Mr. Olszewski is Assistant Relay Chief, in Roadway's Akron facility, and has been with the company for fifteen years. (TR 268-270). He was Scott's supervisor and responsible for training and disciplinary action. (TR 270, 607). Mr. Olszewski explained Roadway's disciplinary process. It begins with letters of warning for violations of the National Master Freight Agreement (MFA), company rules and procedures, work rules, etc. (TR 607). Local hearings are the second step in the process where a driver's record for the past nine months is discussed with the union to find a solution. (TR 608). The matter may subsequently go to the OJSC, the JAC, and eventually to the national level and arbitration. (TR 608). Roadway's longstanding practice, when determining appropriate discipline for an employee, is to consider the employee's length of service and overall work record. (Brief page 3-4; TR 183, 189, 219-220, 238-239, 241-242, 244-245, 250, and 257).

Mr. Olszewski's relay branch issued about twenty warning letters per month and he personally wrote 70 percent of them. (TR 274). Mr. Olszewski testified that he believed Scott had been "suspended" by Roadway six times and had been given approximately 50 letters of warning, if not more. (TR 610, 625; RX 1-169-9 & 10; RX 5-168). Mr. Scott admitted to two suspensions and less than twenty warning letters before 1997. (TR 392-393; RX 4-171 page 93-99). Mr. Olszewski said multiple drivers were given warning letters for violations of the sick call day rules. (TR 342). In fact, as discussed in section "E" below, drivers 9, 22, 27, 28, 34, 57, and 94 had similar warning letters. Scott testified that ninety-nine percent of the warning letters he received in 1997 were unjustified. (RX 4-171, p. 350).

[16] Roadway argued that warning letters, i.e., 4/1/97 and 10/10/ 97, could not be "grieved" to the union under the National Master Freight Agreement and therefore any such grievance filed by Scott was invalid. (TR 29).

Mr. Scott was given "letters of warning" for the following "infractions, on the dates indicated:

Infraction	Date	Issuer	Exh. #
1. Unavailable for work 6/17/96.	6/18/96		RX 1-169-9
2. August 6, 1996 speeding citation.	8/12/96	Olszewski	RX 1-169-9
3. Violation of "48-hour off" work rule.	8/13/96		RX 1-169-9
4. Work unavailability 8/29-30/96 for lawyer's call.	8/29/96	Olszewski	RX 1-169-9
5. Accident caused by recklessness & failure to report accident of 11/13/96. (Discharge Letter)(RX 8-166A-166P are photographs involving the accident). (TR 638- 643, 644- 655; RX 4-171 page 109-128).	11/15/96	Olszewski	RX 1-169-9
6. Stealing Co. money caused by double payment at Scott's request. (RX 4-171 pages 152-154)	11/18/96	Olszewski	RX 1-169-9
7. Driving defective/unsafe truck 11/13/96 & misinforming supervisor of defect.	11/19/96	Olszewski	RX 1-169-9
8. Recap of local hearing letter re: discharge. [Primarily re; 11/13/96 accident & work record].	11/21/96	Olszewski	RX 7-15A (TR 629)
9. Failure to complete shift with 2.25 hours remaining & saying he had no time left.* (TR 275; RX 4-171 p. 174)	3/24/97	Peterson	RX 1-169-9 RX 1-169-11 CX 14-4A
10. Unavailability for work by going on sick call 3/28-3/31/97 at 1100.* (RX 4-171 pp. 177-205).	**4/1/97**	Olszewski	**RX 1-169-9** CX 2-5A RX 1-169-17
11. Fail to report to work on time 4/4/97. (4 minutes late). (TR 195, 286). (RX 4-171 p. 208)	4/7/97	Peterson	RX 1-169-9 RX 1-169-23 CX 15-6A

12.	Fail to make running time 4/16/97. (49 min. late).* (TR 289) (RX 4-171 p. 217-220)	4/21/97	Aeppli	RX 1-169-9 RX 1-169-26 CX 16-7A
13.	Fail to report to work on time 8/11/97. (10 min. late).* (TR 199, 306). (RX 4-171 p. 220)	8/13/97	Doody	RX 1-169-9 RX 1-169-32 CX 17-8A
14.	Violation of 48-hour rule (lawyer will call, 8/26-8/27/97).* (TR 307, 313-332, 682; RX 4-171 p. 227)	9/5/97	Olszewski	RX 1-169-9 RX 1-169-37 CX 18-9A
15.	Fail to make running times 9/17 & 9/18/97. (1 ½ hours + 0.62 hours).* (TR 333-338; RX 4-171 p. 245-253).	9/25/97	Olszewski	RX 1-169-9 RX 1-169-51 CX 19-10A
16.	Unavailable for work 10/5/97 by going on sick call 10/5-10/9/97 w/o sick days remaining.*(TR 96, 340, 448; RX 4-171 pp. 255-264).	**10/10/97**	Olszewski	**CX 2-5A** RX 1-169-10 RX 1-169-69 CX 7-12A
17.	Fail to follow instructions 10/20/97. (Resulting in 15 service failures).* (RX 4-171, pp. 267)	10/23/97	Olszewski	RX 1-169-10 RX 1-169-64 CX 35-13A
18.	Fail to make running time Fleetwood in Somerset, PA, on 10/20/97.* (1:28 min late). (RX 4-171 p. 264-)	10/23/97	Olszewski	RX 1-169-10 RX 1-169-83 CX 34-14A
19.	Fail to make agreed running time 10/21/97. (Rescinded). (RX 4-171, p. 283)	10/23/97		RX 1-169-10
20.	Fail to answer work call 11/19/97. (RX 4-171 pp. 314-5).	11/21/97	Olszewski	RX 9-50A
21.	Dishonesty & fail to complete work call 11/21/97. (RX 4-171, pp. 320-324).	11/25/97	Olszewski	RX 10-51A
22.	Fail to follow work rules re "48-off" 11/19-22/97. (RX 4-171, pp. 329-332).[17]	11/26/97	Olszewski	RX 11-52A
23.	Unavailability for work by going on	**12/3/97**	Olszewski	**RX 12-53A**

[17] It appears this letter was withdrawn on 1/30/98, because no violation was found . (RX 4-171, exh. 33).

	sick call 1268 hours 11/27/97- 0008 hours 11/29/97. (RX 4-171, pp. 324-329).			
24.	Fail to follow instructions resulting in 100 miles off-route & delaying freight.	12/9/97	12/12/97	Olszewski	RX 13-54A
25.	Three-page computer-generated disciplinary recapitulation of Scott's disciplinary record, 1993- 9/9/96.				RX 168A, B, C

* denotes this action was followed by Scott's protests or grievances. The matters denoted with bold lettering pertain to violations of the sick call policy.

Both Mr. Olszewski and Mr. Scott testified about the circumstances behind the warning letters. At his deposition, Scott testified that the November 1996 accident was caused by his load shifting as he drove the speed limit on a curve on the interstate causing the rear trailer to flip. (RX 4-171, page 110-128). Scott averred that the information in the November 15, 1996 (accident) warning letter was not true. (RX 4-171, page 129).

Mr. Olszewski said he had no reason to disbelieve Scott concerning his response to the March 24, 1997 (fail to complete shift) warning letter. (TR 278). Roadway claimed he misled the dispatcher when questioned about his remaining available work hours, but Scott denied he had been asked if he had remaining hours left in which he could drive. (RX 4-171 pp. 174-177). The fact is he had time remaining in which he could have worked, but was not assigned any shuttle run because of his response. (TR 224-225, 227-228, 660-661).

Mr. Olszewski testified the "call-card" shows Mr. Scott was called for a shuttle at 1064, subsequently requested placement on the sick board at 11:00 on March 28, 1997, and called to return to the active board at 0698 on March 31, 1997. (TR 279; 664). Scott agreed. (TR 416-419). Scott testified concerning this letter of warning at his deposition. (RX 4-171 pp. 177-205). Scott testified he started his sick leave on March 28, 1997, but did not drive to visit the doctor until March 29, 1998. (TR 421-2). At his earlier deposition, Scott had testified that he had a hip problem and was in extreme pain which affected him to the point where he could not drive. (RX 4-171 page 32; TR 440). He said he was sick during this entire period. (RX 4-171 p. 200). He considered Roadway's issuance of warning letters under these circumstances coercive. (RX 4-171 p. 205). In light of Dr. Negi's illness verification, March 29, 1997, Roadway's argument that the "deficient" doctor's excuse makes his claim that he was too ill to drive not credible, is unsupported. Scott had not gotten warning letters for sick days when he had had adequate sick days available. (TR 424). Scott testified he had gotten sick while on duty, but never went into work with diarrhea. (RX 4-171 p. 207-8).

Mr. Olszewski testified that a room full of Roadway drivers was held up as a result of Scott's tardiness on April 4, 1997. (TR 672-3). Roadway's policy is that a driver who accepts a work call must report to work within two hours of that call. (TR 665-667). Scott was allegedly four minutes late. Scott denied he was late for work. (RX 4-171 p. 209). At his deposition, Scott said he tape recorded Mr. Olszewski and Mr. Peterson "because he doesn't always tell the truth about these things." (RX 4-171 p. 213).

Mr. Olszewski doubted Scott's claims of traffic delays in regard to the April 21, 1997 letter of warning. (TR 676). He was allegedly 49-minutes late. Scott's trip logs reflect he took a one half hour break just ten minutes before reaching his home destination in Akron. (TR 678). Scott disputed that letter. (RX 4-171 p. 217-220). Mr. Olszewski testified that when called drivers must report to work within two hours and that if a driver subsequently reports off Roadway's freight scheduling is "destroyed." (TR 665).

Scott testified he was not late on August 11, 1997 as Roadway asserted in its August 13, 1997 warning letter. (RX 4-171 p. 220). Concerning the "48-off" violation which was the subject of the September 5, 1997 warning letter, Scott testified that he did not understand the rule at the time because it had been recently changed. (RX 4-171 p. 229-23).

Mr. Olszewski did not believe Scott had adequate justification, i.e., fog and road construction, for not making his running times which were the subject of the September 25, 1997 letter of warning. (TR 333-338). Scott disputed this letter as well testifying he did make his running times. (RX 4-171 pp. 245-253).

Scott testified he was out sick from October 5 until October 9, 1997 and had no reason to question the times listed on the warning letter concerning that incident. (TR 448-450; RX 4-171 pp. 255-264). He did not think he had any remaining sick days remaining at the time. (TR 450). He saw Dr. Bouchard in October 1997 for a medical condition. (TR 458). His physician prescribes Naprosyn, among other medications, for his hip pain. (TR 460). Dr. Bouchard provided an illness verification form stating Scott was incapacitated due to illness or injury. (RX 1-169, page 71). Roadway presented no independent evidence to the contrary. Scott testified that Roadway coerced him to operate a motor vehicle by requesting him to go to work (when he was ill). (RX 4-171, p. 263).

With respect to the October 23, 1997 warning letter for not making his running time, Scott testified that he in fact did make his running time and there was no agreed running time in effect. (RX 4-171, pp. 264-267). Scott disputed the October 23, 1997 warning letter contending he did, in fact, follow the instructions he was given which were not those described in the warning letter. (RX 4-171 pp. 268-279). He also testified that he had made his running time. (RX 4-171 p. 279). Scott's failure to follow the instructions, with which another driver had no difficulty, resulted in fifteen customer service failures. (TR 230, 698-700; RX 1-169, page 74).

Mr. Scott denied having any accidents, altercations, or speeding tickets or stealing in the nine months before his October 1997 discharge. (TR 153-4). He said he was familiar with the Family and Medical Leave Act. (TR 395). He had been provided a copy of Roadway's work rules for 1996 and 1997. (TR 396-7).

Scott disputed the 11/21/97 letter of warning for "Fail to answer work call." (RX 9-50A). At his deposition he testified that Roadway knew he was available to be paged on his pager yet he was not "beeped" and Roadway did not follow its work rules calling him (RX 4-171 pp. 314-5, 320). Scott contested his 11/25/97 warning letter as well. (RX 4-171, pp. 320-324).

At his deposition, Scott testified that his health was generally "okay, fair" and that he had never been treated for a serious illness or disease, that he had a hip problem caused by an accident, December 12, 1993. (RX 4-171 pages 8, 13). He added the hip problem flares up in damp or cold weather. (RX 4-171 page 10).

Scott contested the warning letter for "Failure to follow work rules re '48-off,' 11/19-11/22/97" issued on 11/26/97. (RX 11-52A). He testified that Roadway had not contacted him as they had claimed in the warning letter and dropped him from the board. (RX 4-171, pp. 329-332).

Scott admitted he was out on sick call from November 27 through November 29, 1997 and claimed he was sick. (RX 4-171, pp. 325-329). However, he testified he could not remember whether he had seen a doctor or provided Roadway with a doctor's excuse at the time. (RX 4-171, p. 326).

Article 46 of the collectively bargained for Central States Supplement to the National Master Freight Agreement, provides that a "warning notice" or letter, shall remain in effect for no more than nine months from the date of the notice. (CX 13-1; TR 181-184).

Mr. Adams, Teamsters Local 24 President, testified that he had seen letters of warning issued for employees being one minute late. (TR 195). According to him Roadway issues their share of warning letters. (TR 196). They send letters to anyone who violates the rules. (TR 241). Mr. Adams explained "running times" are the agreed upon trip times expected in the normal course of business, not including extra-ordinary events, i.e., accidents. (TR 198, 289). "See you in two," in driver's parlance, means a driver who is recalled by a company will report within two hours. (TR 226, 240). He said employees just about always file protest letters to Roadway's letters of warnings. (TR 234-5). However, letters of warning and violations of federal law may not be grieved through the grievance procedure. (TR 236, 249). Rather, only contract violations may be "grieved." (TR 246).

For purposes of this case, I need not rule on the validity of each of Roadway's disciplinary actions against Scott. Roadway presented evidence that it had similarly issued letters of warning to other drivers and not singled-out the complainant. (See Section "E" *infra*). However, for the reasons discussed below, I find Roadway's imposition of letters of warning, disciplinary actions, against Mr. Scott on the three occasions he took sick call without having any sick or leave days available, i.e., April 1, 1997, October 10, 1997, and December 3, 1997, constituted violations of the Act.[18] In other words, Roadway took disciplinary action, i.e., letters of warning, against Scott because he refused to drive because doing so would violate 49 C.F.R. § 392.3. I do not accept Roadway's argument that the letters were merely for Scott's "unavailability" pursuant to its attendance policy. In this respect, I note the warning letters themselves refer to going and remaining on "sick call" without sick days remaining.

E. Discipline of Other Drivers

Mr. Scott submitted redacted copies of letters of warning Roadway had given to his peers between January 1996 and December 31, 1997. (CX 20-27A-M; CX 21-28A-D; CX 22-29A-F; CX 23-30A-L; CX 24-31A-D; CX 25-32A-E; CX 26-33A-D; CX 27-34A-G; CX 28-35A-H; CX 29-36A-C; CX 30-37A-H; and CX 31-39A-M).[19] He testified that there were drivers with more unexcused absences than he who had not been fired. (TR 144). Mr. Adams, President, Teamsters Local 24, testified that in his eleven years union experience, he had seen a lot of Roadway letters of warning (for offenses similar to Scott's) and represented more than 100 employee grievants. (TR 178-9, 216). He opined an employee had to have "a lot of letters before normally there is a discharge." (TR 179). Mr. Olszewski testified Roadway issued about twenty warning letters per month at the Akron facility and that all drivers got such letters for violation of Roadway's absentee policy.

Driver "9" had thirteen letters of warning between February 1996 and November 10, 1997. (CX 20-27A-M). They were for: five unexcused absences due to illness without any sick days; violation of lawyer will-call rules; a speeding citation; unauthorized vacation extension; two failures to meet running times by 30 minutes and 2 ½ hours; improper logging procedures; failure to meet running time by over two hours and delay of freight; and, insubordination at DuBois, PA, terminal. Mr. Olszewski testified this driver was discharged in May 1998 for his overall work record. (TR 362, 384).

Driver "13" had four letters of warning between March 7, 1996 and June 11, 1997. (CX

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[18] I observe that although Scott did not provide any doctor's excuse for the November 27 - 29, 1997, absence, Roadway did not challenge his dubious assertion that he was in fact sick.

[19] While these fellow drivers personal identifying data was redacted by my discovery order, out of necessity their names were used during the testimony. The case file originally contained the original unredacted versions which were not admitted into evidence. In a further effort to protect the privacy of these drivers, I refer to them by a number designator found at the bottom of each letter. Thus, the subject of the February 27, 1996 letter of warning found at CX 20-27A is driver "9." (TR 387-388). Because the inviolability of administrative law judges' protective orders is not universally agreed upon and to avoid the possibility of disclosure of this personal information, I have returned the original documents to counsel for Roadway.

21-28A-D). They were for: two speeding citations; failure to attend driver training; and, speeding in yard. Mr. Olszewski testified that to his knowledge this driver had not been discharged. (TR 364).

Driver “22" had six letters of warning between March 26, 1996 and July 28, 1997, five of which were in the previous nine months. (CX 22-29A-F). They were for: failure to follow instructions or delay of freight (10 bills); twice unavailable for work; 43 minutes tardiness; and, two unexcused absences due to illness without any sick days. Mr. Olszewski testified this driver was not fired. (TR 367).

Driver “27" had twelve letters of warning between June 26, 1996 and November 25, 1997, five of which were in the previous nine months. (CX 23-30A-L). They were for: delaying freight and not complying with DOT log entry regulations; delaying freight & noting earlier oral warnings; improper work clothes; one hour late dispatch; two unexcused absences due to illness without any sick days; unexcused absence; 20-minutes late for work; four-day unexcused absence from work; delaying freight due to not following proper procedures (local hearing planned); failure to report for work; and, a speeding citation. Mr. Olszewski testified he had not been fired. (TR 368). Mr. Olszewski testified he was an outstanding driver who represented Roadway at the National Truck Driving Championships. (TR 736-737).

Driver “28" had four letters of warning between April 23, 1996 and February 4, 1997, three of which were in the previous nine months. (CX 24-31A-D). They were for: delaying freight; failure to follow instructions; unexcused absence due to illness without any sick days; and, an improper pre-trip inspection. Mr. Olszewski testified this driver is still employed at Roadway. (TR 371).

Driver “32" had five letters of warning between May 7, 1996 and April 3, 1997, four of which were in the previous nine months. (CX 25-32A-E). They were for: failure to follow instructions; two violations of 48-off work rules; failure to answer work call; and, accepting a work-call then calling in sick to back on sick call. Mr. Olszewski testified that this driver was not fired. (TR 372).

Driver “34" had four letters of warning between July 26, 1996 and March 28, 1997. (CX 26-33A-D). They were for: unavailability for work by being on sick call 44.53 hours; two unexcused absences due to illness without any sick days; and, failure to follow rules regarding doctors will-call. Mr. Olszewski testified that this driver is still employed at Roadway. (TR 373).

Driver “40" had seven letters of warning between April 15, 1996 and July 21, 1997, five of which were in the previous nine months. (CX 27-34A-G). They were for: three unexcused absences (local hearing planned); twice failing to follow work rules to change status from doctors will-call to sick call over four-day period (local hearing planned) and a two-day period; and, a 40-minutes tardiness after calling in. Mr. Olszewski testified that this driver was not fired but has

been off work for over a year. (TR 374-5). This driver had been fired and then reinstated through the grievance-arbitration process. (TR 741-742).

Driver "57" had seven letters of warning between May 23, 1996 and December 11, 1997, six of which were in a nine month period. (CX 28-35A-H). They were for: unavailable for work; running out of fuel; unavailable for work by going on doctors' will-call for five days; speeding citation; 15 minutes tardy; 17 hours unavailable for work; violation of 48-off rules (local hearing planned); and, a two-day absence by going on sick call. Mr. Olszewski testified that this driver is still employed at Roadway. (TR 376).

Driver "63" had three letters of warning between January 8, 1996 and May 7, 1997. (CX 29-36A-C). They were for: failure to follow instructions, delaying freight, and sabotaging company equipment (local hearing planned); fail to follow instructions; and, a speeding citation. Mr. Olszewski testified that this driver is still employed at Roadway. (TR 378). This driver had over one million preventible-accident-free miles with Roadway. (TR 743-744).

Driver "72" had eight letters of warning between March 15, 1996 and December 10, 1997. (CX 30-37A-H), only one of which was in the previous nine months. They were for: speeding citation; falsifying log; stealing company time (relating to falsifying log incident); twice stealing company time (local hearing planned); six-day suspension following local hearing based on prior 9-month work record; and, unprofessional conduct. Mr. Olszewski testified that Roadway had sought discharge, but agreed to a suspension. (TR 380). This driver had been with Roadway for about twenty years with 1.9 million accident-free miles. (TR 745-747).

Driver "94" had thirteen letters of warning between March 26, 1996 and August 29, 1997, six of which were in the previous nine months. (CX 31-39A-M). They were for: delaying dispatches; suspension for suspicion of drug use which was rescinded; leaving work without completing shift; unexcused unavailability for work; failure to answer beeper for work call; failure to follow safety procedures resulting in personal injury; two violations of 48-off policy; unexcused absences due to illness without any sick days; failing to change status from doctors will-call to sick-call; falsifying logs; and, a hearing recap of past work record with no action. Mr. Olszewski testified that this driver was not suspended and is still employed at Roadway although six warning letters were considered at his local hearing. (TR 380, 383).

"Proof that similarly situated nonprotestors were disciplined just as harshly for the same infraction suggests nonretaliation." *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987) at 230 *citing cf DeCinto v. Westchester County Medical Center*, 821 F.2d 111, 115 (2d Cir. 1987).

These records pertaining to the treatment of Roadway's other drivers show that Scott was not uniquely singled out for disciplinary action. In fact, supervisory issuance of letters of warning for routine work rule minor infractions, among others, including violations of the sick leave

policy, appears to be the pattern. For example, driver 9 with thirteen warning letters and who had violated the sick leave policy five times was discharged. Roadway had either initiated the process or attempted to discharge drivers 27, 72, and 94 for their numerous infractions, including violations of the sick leave policy. However, there were other drivers who had violated the sick leave policy and had fewer warning letters who continued to work for Roadway. These disciplinary records illustrate that Roadway legitimately utilized warning letters in the management of its personnel.[20] However, evidence of disparate treatment is not a required element. *Cf. DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983); *contra Roadway Express., Inc. v. Dole*, 929 F.2d 1060, 1064-1065 (5th Cir. 1991).

Nonetheless, it is established that Roadway, in addition to legitimate reasons for disciplining Scott, as it would and had disciplined other drivers, also disciplined him for his violations of Roadway's sick leave policy which I find constitutes a violation of the Act.

F. Termination or Discharge

Mr. Olszewski testified that he believed Scott had been "discharged" by Roadway five times. (TR 610; RX 5-168). Mr. Scott said he was not sure but not five times. (TR 391; RX 4-171 p. 228-9). Five of the discharges sought by Roadway had been reduced to less severe sanctions, such as suspensions. (RX 5-168; TR 610- 621). The first attempt to discharge Scott was in September 1993. (TR 613). The second in August 1995. (TR 616). The third was in February 1996.[21] (TR 617). The fourth was in November 1996 for an accident and his overall work record which was reduced to a 122-day suspension without pay by the JAC. (TR 624- 625, 629-631; CX 33-3A; RX 7-15G; RX 5-168-9; RX 1-169-5, 7, & 87; TR 413-415).

Scott believed his termination was unfair and resulted from almost a "conspiracy" by Mr. Olszewski and Roadway personnel to intimidate, harass and terminate his services as a result of matters he had raised like safety regulations. (RX 4-171, pp. 289-291). He expressed his belief that Mr. Olszewski falsified records and statements to justify the warning letters. (RX 4-171, p. 289-290). He believed the dispatchers "made it their aim to go after me." (RX 4-171 p. 291). Scott testified that he had brought safety matters to Roadway's attention other than in his responses to letters of warning. (RX 4-171, pp. 294-301). Scott testified that ninety-nine percent of the warning letters he received in 1997 were unjustified. (RX 4-171, p. 350).

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[20] Except in so far as I have found a violation of the STAA because of Roadway's sick leave policy.

[21] On February 14, 1996, Roadway gave Scott a "Recap" letter, signed by Mr. Olszewski, iterating the substance of a local hearing held on February 12, 1996 to consider his discharge. (RX 6-147G; TR 626- 627). The letter states the following infractions were considered: "two unsafe driving letters for motorists' complaints; threatening a supervisor at the Philadelphia terminal; misuse of company time; local discharge hearing held August 25, 1995; two failure to follow instructions letters; misuse of company time again; a failure to complete shift; and failure to make running times within that shift; falsifying company documents; and delaying freight by being off route." (RX 6-147G). Eventually, this proposed discharge was reduced to a three-week suspension. (TR 618, 624, 627; RX 5-168).

On 10/29/97, Roadway (Mr. Olszewski) gave Scott a Recap of local hearing letter (10/27/97) regarding a discussion of his previous work record for the past nine months and an agreement to meet to discuss three letters of warning dated 10/23/97 for failure to follow instructions and failure to meet running times. Roadway sought his discharge. (TR 657; RX 1-169-1 & CX 5-17). This was eight days after Scott's last grievance. (TR 356; CX 7-12E). Scott, representatives from both Roadway and the Union attended, and Scott's responses, protests and rebuttals were read. (TR 101, 218, 462; RX 4-171, p. 285). His union representative said some things on his behalf. (TR 463). His overall work record was discussed. (TR 464). Scott made a statement in his own behalf. (TR 466). Mr. Scott testified that CX 8-19A summarized his grievance. (TR 102). A meeting between Roadway and the union was held after October 31, 1997, which Scott, who had been given notice, did not attend, wherein the three warning letters of October 23, 1997 were discussed. (TR 658-9, 856). One of the three warning letters was rescinded by Roadway.[22] (TR 659).

After a November 20, 1997 hearing and the grievance process was completed, at the Ohio Joint State Committee (OJSC) level, the discharge was upheld on January 14, 1998. (CX 8-19A; TR 108-110; RX 4-171, p. 356 & Dep. Exhibit 35).

Mr. Olszewski testified that Mark Rosendale, the relay manager, Rick Spradlen, the labor manager, and he jointly decided, between October 23 and October 25, 1997, to discharge Scott. (TR 356, 855). Mr. Olszewski believed ten or eleven letters contributed to Scott's discharge. (TR 370). Mr. Olszewski testified that he knew of no other Roadway driver with a worse disciplinary record than Scott and that Scott would have been terminated even absent two warning letters for being on the sick board because of the repeated infractions reflected in his overall work record. (TR 750).

Although Scott testified he did not know why Roadway discharged him, he believed Roadway relied on the letters of warning of 4/1/97 and 10/10/97 to discharge him. (TR 78, 82, 149). Scott did not believe he had a chance to explain his position to the OJSC although he had furnished them with a notebook. (TR 470). Mr. Adams, President, Teamsters Local 24, who participated in the local hearing, testified that Roadway relied on the eight letters between March 1997 and October 1997 to discharge Scott, but not the last three letters of October 23, 1997. (TR 205, 207). Mr. Adams testified that the stated grounds for discharge, were not, in his opinion, sufficient to justify Mr. Scott's discharge because he had tried to save Scott's job. (TR 212-213, 242). According to Mr. Adams, they at the union do not like any employee fired for his overall work record. (TR 213). However, Mr. Adams believed Scott was treated the same as other employees. (TR 234).

Article 46 of the Central States Supplement to the National Master Freight Agreement, allows employees to remain on the job after notice of suspension or discharge until the

[22] The other two letters concerned Scott's failure to meet running times and to follow instructions for the October 23, 1997 incident. (TR 660).

suspension or discharge is sustained under established grievance procedures.[23] (CX 13-1). "Just cause" is required for discharge. (TR 182-183). According to Mr. Adams, Teamsters Local 24 President, under Article 46, a company may not go back beyond nine months prior to a discharge hearing date to find grounds, e.g., letters of warning or prior discharges, for discharge. (TR 184-185, 189). They may consider "recap" letters, i.e., the March 14, 1997 recap letter here, dated within that nine month period. (TR 220). Mr. Adams testified that he has seen drivers with fewer warning letters than Scott get fired. (TR 236). He has also seen drivers go before the OJSC more than three times, but it was unusual. (TR 236-7).

As the ARB has noted, "'whether an employee has been discharged depends on the reasonable inferences that the employee could draw from the statements or conduct of the employer."' ARB Case No. 98-104, ARB Final Decision and Remand Order (Remand Order), Jan. 9, 1997, slip op. at 4, quoting *Pennypower Shopping News, Inc. v. N.L.R.B.*, 726 F. 2d 626, 629 (10th Cir. 1984). As the Court in *Pennypower* noted:

> The fact that there is no formal discharge is immaterial if the words or conduct of an employer would logically lead an employee to believe his tenure had been terminated . . . [S]ince the company created the ambiguity which reasonably caused the employees to believe they were discharged, or at least to believe their employment status was questionable due to their strike activity, the burden of the ambiguity must fall on the company.

Pennypower Shopping News, Inc. v. N.L.R.B., 726 F. 2d at 630. Although Scott was notified of his impending termination on October 27, 1997, one day before Roadway was notified by OSHA of Scott's complaints, I find his termination was effective on January 14, 1998.

In ascertaining the reasons for Roadway's discharge of the complainant it was appropriate to consider Roadway's disciplinary actions against the complainant before the immediate disciplinary actions resulting in his discharge. *Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133, 1141 (6th Cir. 1994). Scott had numerous, legitimate, disciplinary actions taken against him prior to his termination.

In analyzing whether the articulated reasons for the discharge are credible, I find there is ample evidence demonstrating that Scott was far from a model employee. For instance, when a physician wrote that he could return to work on a given day, Scott would wait until the day was nearly over to return. A reasonable man would make himself available to work on the day a doctor says he could return, but Scott abused the doctor's excuse, in part, by reporting after 11:00 p.m. on one such day. Scott had at least one speeding citation, repeatedly did not make his

[23] National Master Freight Agreement Covering Over-the-Road and Local Cartage Employees of Private, Common, Contract and Local Cartage Carriers, April 1, 1994 through March 31, 1998, between the company and the Teamsters National Freight Industry Negotiated Committee representing the Local Unions affiliated with the International Brotherhood of Teamsters.

running times and repeatedly violated company policies and rules, i.e., the 48-off rules and with respect to reporting his 1996 accident. He was less than completely forthright with Roadway on more than one occasion. Scott received numerous warning letters and discharge letters, but did not improve his record. In spite of his obvious intelligence, he failed to follow relatively simple instructions concerning his runs on several occasions which resulted in Roadway not meeting its customer requirements. I find no discriminatory intent in Scott's termination. *See, Webb v. Carolina Power & Light Co.*, Case No. 93-ERA-42, Final Dec. and Ord., Aug. 26, 1997, slip op. at 14; *accord, Acord v. Alyeska Pipeline Svc. Co.*, Case No. 95-TSC-4, Final Dec. and Ord., June 30, 1997, slip op. at 5-9.

When there are both legitimate and discriminatory reasons for an adverse action, the dual motive analysis applies. *Spearman v. Roadway Express, Inc.*, Case No. 92-STA-1, Sec. Final Dec. and Ord., Jun 30, 1993, slip op. at 4, *aff'd sub nom. Roadway Express, Inc. v. Reich*, No. 93-3787 (6th Cir. Aug. 22, 1994), 1994 U.S. App. LEXIS 22924 *and Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133, 1140 (6th Cir. 1994). Under the dual motive analysis, the burden shifts to the respondent to show that it would have taken the same action against the complainant even in the absence of protected activities. *Asst. Sec. and Chapman v. T. O. Haas Tire Co.*, Case No. 94-STA-2, Sec. Final Dec. and Ord., Aug. 3, 1994, slip op. at 4, *appeal dismissed*, No. 94-3334 (8th Cir. Nov. 1, 1994).

Scott claims that Roadway falsified records and statements to justify warning letters are not proven. Scott did not establish ingenuous reasons for the vast majority of his derelictions.

As the Sixth Circuit has observed, "The relevant inquiry is the employer's perception of his justification for the firing." *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 230 (6th Cir. 1987). I find that Roadway has established that even absent any protected safety complaints or protected refusals to drive due to illness on Scott's part, the company legitimately would have fired him for his abysmal record. In this case, Roadway provided a credible explanation for discharging Scott. I find that Scott did not establish by a preponderance of the evidence that the reasons given for his discharge were pretextual.

G. Roadway's Attendance or Absence Policy

Roadway argues that the National Master Freight Agreement and the Central States Area Over the Road Motor Freight Supplemental Agreement (hereinafter "Supplemental Agreement") govern the disciplinary process for Roadway's over-the-road drivers. Brief at page 2. According to Mr. Adams, Teamsters Local 24 President, the union is governed by the Agreements. (TR 182). The NMFA, Article 38, Section 1, addresses the general award of five days of sick leave per annum, but not any procedure for violations of Roadway's sick leave policy. Section 3 permits employees to take up to twelve weeks of unpaid leave for "serious health condition(s) of the employee," under the Family and Medical Leave Act. However, that Act is not implicated in the present case.

The Bid Work Rules: All Drivers, Akron Domiciled Road Drivers, May 27, 1997, paragraph 12, sets forth the rules concerning a driver holding his position on the board upon changing one's status from a doctor's appointment ("doctor will call") to "sick call", or absence for sickness. (CX 18-9F). When a driver was sick if he was called to work he would notify the company he was sick. (TR 59). Roadway would then take the driver "off the board," i.e., put his name on a sick board until he called back. (TR 59). If a driver is out for 24 hours or less, seeks a doctor's attention, and returns to work within the first 24 hours, the driver is not penalized for the absence; it is an excused absence even if the driver has no remaining sick days. (TR 169, 667). If a driver calls in sick and has sick days available, one of those days is deducted. (TR 369). If a driver calls in sick, has sick days available, but fails to bring in a doctors' excuse he is disciplined and given a warning letter. (TR 370).

Roadway's Akron policy is that a driver uses his or her sick days when sick. (TR 343). Drivers get five sick days per year under an agreement negotiated with the union. If they wish to take more than the five sick days, they must use personal holidays, vacation days or family medical leave. Drivers employed more than one year receive two weeks of vacation per year. (TR 394). If they do not use any of those options and go beyond the five allotted sick days per year, Roadway issues a letter of warning for the "unexcused absence" "essentially automatically." (TR 23, 29, 282). Mr. Olszewski testified that if a driver accepts a work call, becomes sick on the way to work, goes back home and calls in sick, that definitely would result in the issuance of a warning letter. (TR 282). Roadway "encourages" drivers to seek medical attention when ill. (TR 667).

Roadway has monthly safety meetings which Scott apparently did not attend. (TR 609). The Akron Roadway Relay has a record of impressive safety improvements, according to Mr. Olszewski. (TR 853-4). Roadway does not directly or explicitly force drivers not meeting DOT Regulation 392.3 criteria to drive. Mr. Adams testified he had no problems with Roadway's safety on the road. (TR 239). Scott testified Roadway had no written policy concerning the disciplinary steps for unexcused absences. (TR 143-4). Roadway conceded that it is an unwritten policy that after three or four warning letters, an employee is warned that a local hearing, between Roadway and the union, will be held. (TR 23). At that time, disciplinary action or no action is worked out. (TR 24). If the parties cannot agree, subsequent negotiated procedural steps are followed.[24] (TR 24, 104).

After receiving Scott's April 18, 1997 grievance concerning violations of the STAA, Mr. Olszewski discussed the matter with his relay manager, Mark Rosendale, and his predecessor, John Gilardo, and the District Labor Manager, Rick Spradlin. (TR 669). It was decided to continue the existing policy. (TR 670). Mr. Olszewski admitted that drivers may take sick days for other purposes and Roadway does not require submission of a doctor's excuse each time a sick day is used. (TR 671).

[24] More fully discussed in the section dealing with "deferral," *infra*.

In *Curless* v. *Sysco Food Svc*, the company's absentee policy permitted employees a certain number of days of excused absence in a rolling 12 month period; however, once an employee used these days, any subsequent unexcused absence, regardless of the reason, constituted an "incident." *Asst. Sectr'y & Curless* v. *Thomas Sysco Food Svc.*, Case No. 91-STA-12 at 2, Sec. Final Dec. and Ord, Sept. 3, 1991, *remanded for vacatur on grounds of mootness*, 983 F.2d 60 (6th Cir. 1993). Beginning with the fourth "incident," progressively greater discipline was imposed for subsequent incidents; for example, the fourth elicited a verbal warning, the sixth a written warning and a one day suspension, and the eighth required discharge. *Id*. at 2, fn. 3. Medicated with Valium and other substances, and under doctor's orders not to drive, Curless informed his employer of the doctor's instructions and that he would not be available to drive the following day. *Id*. at 1-2. Curless received a verbal warning for this absence, as it constituted his fourth "incident." *Id*. at 2. The company argued that it took adverse action against Curless, not for protected activity, but because he "ran afoul" of the absentee policy. The Secretary, however, held that the company's articulation of the cause for the punishment would not suffice. "Complainant 'ran afoul' of [the company's] policy <u>because</u> he engaged in protected activity." *Id*. at 6 [emphasis added]. Thus the Secretary held that a violation of STAA had occurred because the company took adverse action against an employee who refused to violate DOT regulations. *Id*. at 6-7.

As the Secretary's rulings in *Curless* and in *Self v. Carolina Freight Carriers Corp.*, Case No. 91-STA-25, Sec. Dec., Aug. 6, 1992, indicate, a policy which permits a company to take adverse action against employees for obeying the law is not "legitimate."

> To permit an employer to rely on a facially-neutral policy to discipline an employee for engaging in statutorily-protected activity would permit the employer to accomplish what the law prohibits.

Id. at 5.

Roadway misses the point. Application of Roadway's absenteeism policy to Scott under the circumstances of this case presented Scott with an untenable choice. He could drive in violation of federal regulations prohibiting the operation of a commercial motor vehicle "while the driver's ability or alertness is so impaired . . . through . . . illness . . . as to make it unsafe for him/her to drive." 49 C.F.R. § 392.3 (1997). Alternatively, he could refuse to drive and be given a letter of warning. This is precisely the kind of situation that STAA's anti-retaliation provision is designed to protect against. 128 Cong. Rec. 29192 (1988).

To permit an employer to rely on a facially-neutral policy to discipline an employee for engaging in statutorily-protected activity would permit the employer to accomplish what the law prohibits. *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802-805 (1945); *St. Francis Fed. of Nurses & Hlth. Pro. v. NLRB*, 729 F.2d 844, 853-854 (D.C. Cir. 1984); *NLRB v. Daylin, Inc., Discount Div.*, 496 F.2d 484, 487

(6th Cir. 1974); *Allied Industrial Wkrs., AFL-CIO Loc. U. No. 289 v. NLRB*, 476 F.2d 868, 875-878 (D.C. Cir. 1973); *NLRB v. Frick Company*, 397 F.2d 956 (3d Cir. 1968).

Moreover, independent statutory rights "cannot be abridged by contract or otherwise waived," and they take precedence over conflicting provisions in a bargained employment arrangement. *Barrantine v. Arkansas-Best Freight Systems, Inc*., 450 U.S. 728, 740-741 (1981) *and see Brame v. Consolidated Freightways*, 90-STA-20 (Sec'y, June 17, 1990). *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1064 (5th Cir. 1991) ("if the collective bargaining agreement conflicts with [the] STAA, then the statute supersedes the agreement because labor contracts cannot operate to deprive employees of rights specifically protected by federal statutes").

The Government interest under the STAA lies in "promoting highway safety and protecting employees from retaliatory discharge." *Brock v. Roadway Express, Inc*., 481 U.S. 252, 262 (1987)." 'Random inspection by Federal and State law enforcement officials in various parts of the country [had] uniformly found widespread violation of safety regulations,' and [Section] 405 was designed to assist in combating the 'increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents.'" Id., quoting 128 Cong. Rec. 32509, 32510 (1982) (remarks of Sen. Danforth and summary of proposed statute). Specifically, STAA Section 405 was enacted:

> to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles. Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations.

Id. at 258.

Neither the ARB nor I hold that employers cannot take action against employees who feign illness.[25] *Assistant Secretary Of Labor For Occupational Safety and Health and Anthony Ciotti, v. Sysco Foods of Philadelphia, Arb Case No. 98-103 (ALJ Case No. 97-STA-00030)* (July 8, 1998). However, by discouraging employee compliance with the DOT prohibition against driving when ill, the respondent's policy contravenes the intent of STAA Section 405. *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258-259, 262 (1987) and *Sysco Foods, supra*.

[25] STAA does not preclude an employer from establishing reasonable methods or mechanisms for assuring that a claimed illness is legitimate and serious enough to warrant a protected refusal to drive.

Scott's refusal to drive because of illness therefore constituted protected activity. In that the letters of warning closely followed the protected activity and the respondent knew about the activity when it issued the letters, causation between the protected activities and the subsequent issuance of letters of warning is shown. *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). Application of Roadway's sick leave or absentee policy, as Roadway calls it, to Scott violated the Act.

H. Deferral to OJSC Action[26]

Roadway argued the Secretary should defer to the outcome of action under a collective bargaining agreement (CBA), i.e., the Ohio Joint State Committee (OJSC) decision here, which upheld the complainant's discharge.[27] Mr. Jake Adams, President, Teamsters Local 24, described the grievance procedure from the local hearing to the OJSC (in Columbus, Ohio) and finally to the JAC (in Chicago) and arbitration (in Washington, D.C.). (TR 176- 178). The OJSC is comprised of four members from the employer's side and four from the Teamsters Union. None of the employer representatives were Roadway employees. (TR 410-411). The company presents its case first and then the grievant and union stewards present the employee's side. (TR 176). Both the company and the union have the right to rebuttal. (TR 177). The parties are then excused while the OJSC deliberates and reaches a decision. (TR 177).

The OJSC transcript states that "[N]o committee member sat in judgment on any case in which he was involved." (RX 2-170). The issue before the OJSC was whether Scott was justifiably discharged. The proceedings were tape recorded. Roadway presented its case. It recapitulated the materials found now in RX 1-169. Scott read his protest or grievance letters to the OJSC, including those in which he argued Roadway had violated DOT regulation 392.3. (RX 2-170 pages 31-33, 47-48; RX 4-171 pp. 340-355). The testimony was not given under oath nor were the parties represented by legal counsel. Scott mentioned on the record that his attorney was not allowed to be present. (RX 2-170 page 90). He did not feel properly represented or that he received a fair hearing. (RX 4-171, p. 348-9). At one point, Scott was not allowed to testify concerning Roadway's use of other drivers to speak against him. (RX 2-170 pages 81-2). Scott testified that he did not know what was in the book Roadway presented to the OJSC. (RX 4-171, p. 345). Other than Scott and Mr. Olszewski, no witnesses were called. There is no indication what rules of procedure or evidence were employed and the proceeding appeared to follow *ad hoc* procedures. There is no indication who prepared the transcript. The record of the OJSC proceeding contains no findings or conclusions of fact or law. Scott's allegations of violations of the DOT regulations are not addressed in the record. There is no indication how the members reached their decision and their decision is not reflected in the transcript. Finally, Scott testified that he complained to the ethics practice committee concerning the way the OJSC hearing had

[26] I denied Roadway's motion for a directed verdict concerning this issue finding it was not clear that the OJSC proceeding met the criteria for recommending deference.

[27] Article 46 of the National Master Freight Agreement, provides that an employee may request an investigation of his discharge and if the investigation "prove" an "injustice" has been done, the employee shall be reinstated. Further, except for "cardinal" infractions, the discharge is not effective until the established grievance procedure is completed. (CX 13-1).

been conducted. (RX 4-171, p. 355 & Dep. exhibit 36).

Roadway submitted a transcript of the OJSC hearing.[28] (RX 2-170). The proceedings which eventually culminated in Scott's discharge began with a local company hearing on October 27, 1998. (RX 1-169-3). Roadway presented 13 letters of warning and argued Scott was a "habitual offender of company work rules" who had not amended his ways and was a "burden on the company." (RX 1-169-3-4; TR 141). Scott was represented by his Union at the local hearing, but gave no testimony. However, the Union read Scott's protest letters into the record.

Roadway presented all 88 pages of the materials found in exhibit RX 1-169 to the OJSC. (TR 32, 852). The OJSC considered the October 23, 1997 letters of warning, as well. (TR 852). Scott was represented by the union and he read his protest letters into the record. (TR 436, 852). Scott left a binder of materials with the committee for their consideration. (TR 437). His union representative raised various points of order which the OJSC ruled on. (TR 438-9). His union representatives presented arguments with which Scott was not satisfied. (TR 443). Mr. Scott did not believe the OJSC dealt fairly or adequately with his STAA claim and that they made no findings of fact or law. (TR 515).

The Secretary, under 29 C.F.R. § 1978.112(c), should defer to the outcome of action under a collective bargaining agreement (CBA) only if it is clear those proceedings dealt adequately with all factual issues, that the proceedings were fair, regular and free of procedural infirmities and that the outcome of those proceedings were not repugnant to the purposes and policy of the STAA. *Martin v. Yellow Freight System, Inc.*, 91 Civ. 8370, 1992 U.S. Dist. LEXIS 7331, 1992 OSHD (CCH) P29,708 (S.D. NY May 18, 1992).

In determining whether to recommend "deferral" it was appropriate to consider the record of the OJSC proceedings. *Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987) *and Brame v. Consolidated Freightways, Inc.*, 90-STA-20 (Sec'y, June 17, 1990). Factors I examined included whether the complainant was represented by counsel, called his own witnesses, cross-examined the respondent's witnesses, whether his union's attorney, if any, conducted meaningful cross-examination or imposed appropriate objections, whether the hearing focused on the events surrounding the incidents resulting in discharge, and whether the parties agreed upon the issues. *Spinner v. Yellow Freight System, Inc.*, 91-STA-17 (Sec'y, May 6, 1992). Further if any deference is to be given, it may only be appropriate to defer to the OJSC's factual determinations, not legal conclusions. *Overton v. Consolidated Freightways, Inc.*, 86-STA-2 (ALJ Mar. 25, 1986) *aff'd* (Sec'y, June 26, 1986).

In light of the above observations, it does not appear that the OJSC proceeding reflected even the minimum requirements of due process. While the proceeding may have followed some rules, no evidence of those rules was submitted. The alleged STAA violations raised by Scott

[28] The OJSC hearing was not recorded by a court reporter, but was taped. (TR 563). Mr. Olszewski, who was present at the OJSC hearing, testified the transcript essentially accurately reported the proceedings. (TR 559).

were not addressed. Scott was not represented by counsel, no cross-examination was conducted and it does not appear the parties agreed to the issues. While the OJSC process may have merit in facilitating negotiated resolution of employer-employee disputes, I find the proceeding had serious shortcomings. Thus, I cannot recommend that the Secretary defer to the OJSC's decision.

VII. DAMAGES[29]

Mr. Scott's payroll records from Roadway show that he was earning $18.40 per hour or $0.46275 per mile when driving, in January 1998. (CX 32-25A; TR 477, 488, 501-502).[30] In addition to his other benefits, at Roadway, his meals and lodging on the road were also reimbursed. Because the majority of his Roadway income came from being paid the mileage rate, it is difficult to ascertain how much he earned per hour. (TR 568). Scott testified that the average driver earned $60,000 per year and he averaged about $900-$1,000 per week at Roadway. (RX 4-171 page 65-66; but see CX 32-25-A).

Scott testified he made no efforts to find other work between being notified of his discharge, in late October 1997, and the effective date of his discharge, in January 1998. (TR 531). He received unemployment from January 17, 1998 until re-employed at the rate of $534 every two weeks. (TR 508; 539; RX 4-171 page 58-60). He spoke with people in the freight business earlier, i.e., Consolidated Freight, Preston, Yellow Freight, and conducted a job search in March 1998. (TR 532, 535-7; RX 3-4; RX 4-171 page 44-58). He earned $16.34 per hour as a "seasonal" truck driver at Highway Asphalt Company where he was paid weekly and $21.75 per hour for overtime.[31] (CX 32-25B-E; TR 488, 494, 506). His average weekly wage is about $1,032.00. (CX 32-25-B; CX 32-25-E). He worked at Highway Asphalt Company (Kenmore Construction) from April 13, 1998 through the hearing date. (TR 479). His full time job involves delivering asphalt that makes streets. (TR 495, 506).

Scott testified, at Roadway, he got one personal vacation day per year, five days of sick leave, two weeks annual vacation, health care coverage, a pension, some extra holiday pay, disability coverage and six years seniority. (TR 488, 494; RX 4-171 page 84-87). He was unsure but believed that currently he receives none of those except possibly a pension and possibly smaller health care coverage. (TR 491-2, 542-545, 571; RX 4-171 page 61-64). He was unsure of any current disability coverage. (TR 499). Scott testified his damages would include lost interest on monies he would have been paid as well as costs directly related to these proceedings. (TR 493). His children have no health care coverage with his new employer. (TR 496). He claims to have suffered credit damage, threats of creditor lawsuits, arrearages on debt payments,

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[29] The complainant's counsel asked to keep the record open to submit further evidence concerning damages. However, I had previously denied a Motion to Bifurcate the hearing seeking the identical relief. Thus, the record will not be held open for submission of further evidence concerning damages.

[30] Apparently, the mileage rate varies depending upon the type of equipment driven. (TR 502). According to Scott, the hourly pay rate increased in 1998. (TR 503).

[31] That increased to $17.00 per hour in August 1998. (TR 508).

aggravation, stress and embarrassment as a result of his discharge. (TR 497-8). However, the complainant did not quantify any dollar amount for the damages he claims to have suffered.

The complainant withdrew and I did not admit a document wherein the Ohio Bureau of Employment Services determined that an ordinary person would not find Scott's conduct justified discharge and thus, approved benefits for the week of January 17, 1998. (CX 12-22 for ID; TR 139-140).

The STAA provides that upon a finding of a violation, compensatory damages may be awarded to the complainant. 49 U.S.C. § 31105(b)(3)(A). In *Michaud v. BSP Transport, Inc.*, 1997 WL 626849 (DOL Admin. Rev. Bd.), the Board held the definition of compensatory damages is not as narrow as that set forth in the Act and includes back wages, pain and suffering, mental anguish, embarrassment and humiliation.

Mr. Scott has not established any damages incurred by reason of the disciplinary actions taken by Roadway against him which I found violated the Act.

VIII. CONCLUSIONS

Mr. Scott's complaints to his supervisors at Roadway, to his union, and eventually to OSHA related to the discipline he received for taking sick days constituted protected activity. However, Roadway neither disciplined Scott nor discharged him because of his complaints. Roadway was not aware of the OSHA complaint until the day after it notified Scott of discharge. Scott's refusal to drive, for illness, constituted protected activity. Roadway violated the Act by disciplining Scott because he engaged in the latter protected activity. Roadway similarly subjected its other drivers to its "absence/attendance" policy.

Mr. Scott was given notice of discharge on October 27, 1997, but allowed to remain on the job, under the terms of the National Master Freight Agreement, until January 14, 1998, when the discharge was sustained by the OJSC. The discharge was thus effective on January 14, 1998. While Scott's discharge was based in part on his protected activity, i.e., the sick call incidents, the discharge was not based on his complaints and Roadway successfully established that it would have discharged Scott even in the absence of his protected activities.

Roadway's Akron facility's facially-neutral policy of disciplining employees who have engaged in statutorily-protected activity violates the Act.

Under the facts of this case, it would be inappropriate for the Secretary to defer to the outcome of the OJSC proceedings.

RECOMMENDED ORDER

The Complainant and Respondent are Ordered:

1. Counsel for the Complainant shall submit a detailed petition for the complainant's costs and fees in bringing and prosecuting the complaint to the opposing parties and the undersigned not later than 30 days from the date of this Order. *Sikau v. Bulkmatic Transport Co.*, 94-STA-26 (Sec'y Oct. 21, 1994). The Respondent has fourteen days in which to submit any objections to such a petition.

2. Counsel for the Complainant shall submit a detailed petition for the complainant's attorney's fees to the opposing parties and the undersigned not later than 30 days from the date of this Order. Complainant's counsel should refer to and address matters referred to in *Hilton v. Glas-Tec Corp*., 84-STA-6 (Sec'y, July 15, 1986). Contingency fee arrangements are not permitted. *Lederhaus v. Paschen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec'y, Jan. 13, 1993) and *Van der Meer v. Western Kentucky University*, 95-ERA-38 (ARB April 20, 1998). The Respondent has fourteen days in which to submit any objections to such a fee petition.

Respondent is further Ordered to:

1. Expunge from its personnel files and records system the warning letters of April 1, 1997, October 10, 1997, and December 3, 1997, and any reference to said letters;

2. Respondent is ordered to expunge from its personnel files and records system any notice of suspension pertaining to Complainant's taking of "sick call" in March 1997, October 1997, and November 1997;

3. To compensate Scott for the costs and expenses he reasonably incurred in bringing this complaint.

4. To post copies of the attached Notice of Findings (APPENDIX A) regarding the Roadway Akron facility's sick call "absence/attendance" policy in conspicuous places in and about its Akron facility such that its drivers may read it; and,

5. Maintain the documents from the personnel records of drivers submitted during discovery, under my Protective Order, in manner consistent with the terms of the Protective Order and such that the personal privacy of such employees is protected until such time as all administrative appeals and other avenues of redress in the Federal courts are exhausted.

RICHARD A. MORGAN
Administrative Law Judge

RAM:dmr

NOTICE: This Recommended Decision and Order and the administrative file will be forwarded for review to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., Washington D.C. 20210. See 29 C.F.R. § 1978.109 (a); 61 Fed. Reg. 19978 and 19982 (1996).

APPENDIX A

In the Matter of

CLARENCE SCOTT, Complainant v. ROADWAY EXPRESS, INC., Respondent

RECOMMENDED DECISION AND ORDER OF NOVEMBER 6, 1998

OFFICE OF ADMINISTRATIVE LAW JUDGES

UNITED STATES DEPARTMENT OF LABOR

CASE NO.: 98-STA-8

Notice of Findings

Roadway Express, Inc., Akron Facility's Sick Call "Absence/Attendance" Policy

The Surface Transportation Assistance Act, 49 U.S.C. § 31105(a)(1)(B), provides:

(a) Prohibitions. -- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because --

> (A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order,
> ...
> (B) the employee refuses to operate a vehicle because--
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
>
> (ii) the employee has a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition. (To qualify for protection under these provisions, a complainant must also have sought from the employer, and been unable to obtain, correction of the unsafe condition).

Motor carrier regulations provide in pertinent part:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through **fatigue, illness, or any other cause**, as to make it unsafe for him/her to begin or continue to operate the motor vehicle.

49 C.F.R. § 392.3 (1997)(Emphasis added).

Roadway's Akron facility's policy of issuing letters of warning to drivers who have no personal vacation days, sick leave or annual leave days available and do not qualify for family medical leave and who take (a) sick day(s) because their ability or alertness to drive is so impaired, or so likely to become impaired, through **fatigue, illness, or any other cause**, as to make it **unsafe** for him/her to begin or continue **to operate the motor vehicle** violated the Surface Transportation Assistance Act in this matter.